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The Removal, Involuntary Retirement and Censure of Federal Judges: The Judicial Tenure Act in Context

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THE REMOVAL, INVOLUNTARY RETIREMENT AND CENSURE OF FEDERAL JUDGES: THE JUDICIAL TENURE ACT IN CONTEXT

The American legal system has long been concerned with the removal, involuntary retirement and censure of judges whose actions are inappropriate to their office. This issue is framed by two equally important but seemingly contradictory considerations. In order to maintain both the appearance and fact of impartiality, judges must be guaranteed some degree of independence from external control.[1] That independence must be limited, however, to prevent it from becoming a shield that perpetuates misbehavior.[2] In order to explore the practical realities of this problem, this comment describes and evaluates the Judicial Tenure Act (the Act).[3] The Act, submitted for the consideration of the 95th Congress[4] by Senator Sam Nunn (D. Georgia), delineates standards and procedures governing the removal, involuntary retirement and censure[5] of federal judges.

As is the case with potential solutions to most problems, it is appropriate to examine and evaluate the Act in context. The aspect of context that seems most relevant in this instance is that of previous attempts to resolve the conflict between the need for judicial independence and the countervailing need for limits upon that independence. As a consequence, the first section of this comment describes an evalua-

1. *See, e.g.*, Nunn, *The Judicial Tenure Act*, TRIAL, November 1977, 26, 28 [hereinafter cited as Nunn]; Comment, *Judicial Discipline, Removal, and Retirement*, 1976 WIS. L. REV. 563, 563 [hereinafter cited as *Judicial Discipline*].

2. *See, e.g.*, Boyd, *Removing Federal Judges: An Alternative to Impeachment*, 49 L.A.B. BULL. 416, 436 (1974) [hereinafter cited as *Removing Federal Judges*]; Nunn, *supra* note 1, at 28; *Judicial Discipline*, *supra* note 1, at 563.

3. At the time of publication, the Act was not yet passed into law. It was introduced in the Senate as S. 1423, 95th Cong., 1st Sess. 123 CONG. REC. S6782 (daily ed. April 29, 1977). Amended on the Senate floor. 124 CONG. REC. S14781 (daily ed. Sept. 7, 1978). Passed in the Senate as amended. 124 CONG. REC. S14782 (daily ed. Sept. 7, 1978). Since the subsequently adopted amendments to S. 1423 were contained in S. REP. NO. 1035, 95th Cong., 2d Sess. (1978) [hereinafter cited as S. REP. NO. 1035], that report will hereafter be cited in place of S. 1423.

4. Similar bills were introduced previously by Senator Nunn (S. 1110, 94th Cong., 1st Sess., 121 CONG. REC. 5720 (1975); S. 4153, 93rd Cong., 2d Sess., 120 CONG REC. 36066 (1974)) and by Senator Tydings (S. 1506, 91st Cong., 1st Sess., 115 CONG. REC. 6220 (1969); S. 3055, 90th Cong., 2d Sess., 114 CONG. REC. 4561 (1968)).

5. S. REP. NO. 1035, *supra* note 3, at 1-2. Hereinafter, the terms removal, involuntary retirement, and censure, on occasion, will be collectively or singularly subsumed under the term "tenure."

tion framework that is used in the second and third sections to assess the procedural strengths and weaknesses of traditional and modern approaches to judicial tenure. The fourth section of this comment applies the same framework to the system proposed in the Judicial Tenure Act. As in sections two and three, the evaluation is concerned with the assessment of procedural strengths and weaknesses. In addition, issues are raised regarding potential constitutional and philosophical problems arising from this approach to judicial tenure.

I. EVALUATION FRAMEWORK

An evaluation framework is utilized here that specifies the major factors that should be taken into account in a critical examination of the various approaches to judicial tenure. These factors are drawn in part from the legal literature on the subject and in part from the author's analysis of the tenure issue. The factors that emerge are: (1) confidentiality regarding the identity of judges against whom charges are brought; (2) validity of procedures for evaluating charges; (3) flexibility in choice of sanction imposed upon guilty judges; and (4) efficiency of use of economic and human resources.

The first issue, confidentiality, concerns protecting the anonymity of the judge against whom charges have been brought. Procedures in which confidentiality is not maintained have one distinct advantage; the existence of at least an appearance of openness suggests that any charges levied will be resolved without resort to illicit machinations. A public examination of charges also allows immediate feedback to any interested party on the responsiveness of the procedure vis-à-vis action upon any individual complaint.

This very openness poses two potential problems. First, a judge against whom an unmeritorious claim has been pressed may well be unable to remove the taint from his reputation, even after having been cleared of all charges. As folk wisdom suggests, charges are generally made on the front page, retractions on the last. Second, if all stages of the procedure are open to public scrutiny, a judge who is in fact guilty of any of the charges has no incentive to shorten the process by admitting guilt and retiring voluntarily. Once charges have been made public, one who chooses to resist has little more to lose than one who attempts to make a graceful withdrawal.

The second issue, evaluation of charges, relates to the procedure by which charges are determined to be valid or spurious. Within this issue are two considerations: (1) whether the process by which the charges are investigated is one that is likely to ascertain the truth, and (2)

whether decision makers are qualified to make a final determination of that truth. A failure of either of these elements can result in persecution of the blameless or a vindication of the blameworthy.

The third issue, flexibility of sanction, acknowledges that different types and degrees of misconduct may require different punitive responses. Some incidences of misconduct may require removal, while others may be enjoined satisfactorily by milder disciplinary action. The issue of flexibility of sanction is tied necessarily and closely to the issue of confidentiality. If the entire procedure is open to public scrutiny, sufficient damage to a judge's reputation may be accomplished merely by bringing and evaluating charges publicly, so that the availability of anything short of removal, *i.e.*, milder disciplinary action, would be unnecessary.

The final issue, efficiency of the overall procedure, relates to the practical utility of the process. If, for example, evaluating charges and sanctioning misconduct require the involvement of a large number of people and/or impose an extreme economic burden, the process is not likely to be initiated in all cases in which it would be appropriate. The evaluation of alternative judicial tenure procedures discussed below focuses on these four issues. When relevant, idiosyncratic considerations are also discussed.

II. TRADITIONAL PROCEDURES

A. Impeachment

One of the most widely available procedures for the removal of judges is impeachment.[6] Impeachment is the proceeding in which the lower house of a legislature, acting in a manner similar to a grand jury, votes a bill of impeachment, and the upper house, sitting as a court, tries the impeachment.[7] Generally, two-thirds of the members of the upper house who are present can convict.[8] Their judgment cannot extend beyond removal and disqualification from office.[9]

An evaluation of the impeachment process discloses several limitations. With regard to the issue of confidentiality, all features of a system that lacks confidentiality apply, since there are no provisions for shielding the identity of judges against whom charges have been filed.

6. Procedures for impeachment can be found in 46 state constitutions and the United States Constitution. W. BRAITHWAITE, JUDICIAL DISCIPLINE AND REMOVAL 3 (1969) [hereinafter cited as JUDICIAL DISCIPLINE AND REMOVAL].

7. *E.g.*, U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cl. 6.

8. *E.g.*, *id.* § 3, cl. 6.

9. *E.g.*, *id.* § 3, cl. 7.

On the positive side, the openness inherent in the impeachment process should theoretically result in a public opinion that the system is not only responsive (*i.e.*, attendant to complaints) but also just (*i.e.*, no illicit machinations). On the negative side, the lack of confidentiality can result in irreparably damaged reputations,[10] that may destroy the judicial effectiveness of those who are impeached but not convicted. In addition, once initiated, the impeachment process does not afford any incentive for a guilty party to admit guilt and retire voluntarily.[11] Once the process has begun, virtually all forseeable damage to reputation has already occurred.[12] Therefore, one who fights the impeachment is not likely to be damaged significantly more than one who does not. However, one who resists may be able to prevent conviction.

The second area requiring attention is the procedure for the evaluation of charges. The impeachment process provides no formal procedures for the preliminary evaluation of complaints. As a result, one must assume that complaints are, at first, only informally judged as to merit; in other words, the claim is initially evaluated in whatever manner the legislative representative who has been apprised of it considers proper. The result, because of both the limited resources and experience of any given legislator,[13] may be that meritorious claims are ignored and trivial ones are prosecuted.

Once past the informal preliminary evaluation, but prior to voting a bill of impeachment, legislative fact-finding, such as would precede the passage of any bill, probably occurs. Since no specific procedure is required, the utility of this stage of the process can neither be evaluated nor relied upon heavily.

Once the bill of impeachment has been voted, the trial of impeachment begins. While more formal than prior phases, the trial is not necessarily more productive of the truth. It has been suggested on numerous occasions that trials of impeachment are more political than judicial in nature.[14] If this is true, the determination of the validity of

10. *See, e.g., Judicial Discipline, supra* note 1, at 566.

11. *See* W. BRAITHWAITE, WHO JUDGES THE JUDGES? 67 (1971) [hereinafter cited as WHO JUDGES THE JUDGES]. (Although in the cited passage the author was discussing courts on the judiciary, which are treated in section III.*A.* of this paper, the same argument applies to any procedure in which confidentiality, at least at the preliminary stages, is not assured).

12. *Id.*

13. Legislators, because of their lack of judicial experience and lack of sufficient time, may not be appropriate parties for making final decisions on the merits of charges in impeachment trials. *See* note 16 *infra*. It follows that they may be an equally inappropriate choice for initially determining the merits of those same charges.

14. *See, e.g.*, Andrews, *Judicial Removal of Federal Judges*, 11 GA. S.B.J. 157, 158 (1975) [hereinafter cited as Andrews]; *Judicial Discipline, supra* note 1, at 566; Comment, *Judicial*

the charges may well be made on bases other than guilt or innocence.[15] Further, it has been suggested that even if the proceedings were truly judicial in nature, legislators may not be the most qualified to make such a determination since they are inexperienced with and lack the time for undertaking the role of judge.[16]

In terms of flexibility of sanction, the third evaluation issue, impeachment must also be found lacking. The only sanction available is removal from office.[17] As mentioned earlier, this limitation on the range of available sanctions could prove to be a serious problem. Not all forms of misconduct necessarily require removal;[18] some may warrant only a reprimand. When such an alternative is lacking, those in authority are faced with two untenable alternatives: they can either overreact to minor infractions or ignore them. The alternatives are equally inappropriate. Without flexibility of sanction, no third alternative that would tailor the remedy to the problem is available.

Finally, one must examine impeachment in terms of its overall efficiency. It has often been said that impeachment is cumbersome and time consuming.[19] Since it requires the attention of an entire legislature for considerable periods of time,[20] "cumbersome and time consuming" may be an understatement. The logical result is that impeachment is a procedure that either incurs extreme costs or is not frequently used. If the latter is correct, the result must necessarily be an abundance of unredressed minor (and perhaps even major) infractions of the appropriate standards of judicial conduct.[21]

Thus, there are several reasons that impeachment is, and has been,

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Discipline in California: A Critical Re-Evaluation, 10 LOY. L.A.L. REV. 192, 197 (1976) [hereinafter cited as *Judicial Discipline in California*].

15. It has been claimed, for example, that in the first impeachment of a judge in California the primary motivation for conviction was a political vendetta, rather than meritorious charges. Stewart, *Impeachment of James H. Hardy, 1862*, 28 S. CAL. L. REV. 61, 67 (1954).

16. *See, e.g.*, Cole, *Discipline, Removal or Exoneration of Alabama Jurists*, 5 CUM.-SAM. L. REV. 214, 217 (1974) [hereinafter cited as Cole]; *Judicial Discipline*, *supra* note 1, at 566; Comment, *The Procedures of Judicial Discipline*, 59 MARQ. L. REV. 190, 196-97 (1976) [hereinafter cited as *Procedures of Judicial Discipline*].

17. *See* text accompanying note 9 *supra*.

18. Finch, *Judicial Selection and Tenure*, 70 F.R.D. 239, 243 (1976).

19. *E.g.*, Andrews, *supra* note 14, at 157; Boyd, *Federal Judges: To Whom Must They Answer?* 61 A.B.A.J. 324, 324 (1975) [hereinafter cited as *Federal Judges*]; *Judicial Discipline in California*, *supra* note 14, at 196; Note, *Judicial Discipline—The North Carolina Commission System*, 54 N.C.L. REV. 1074, 1075 (1976) [hereinafter cited as *North Carolina Commission System*].

20. *See, e.g.*, Cole, *supra* note 16, at 217.

21. *E.g., Judicial Discipline in California*, *supra* note 14, at 196.

rarely used.[22] Among those reasons are the facts that impeachment does not insure confidentiality at even the earliest stages, does not provide a formal procedure for the evaluation of charges, does not allow for flexible sanctions, and is not an efficient use of economic and human resources.

B. Address

The address procedure[23] is similar to impeachment and is available in a majority of the states.[24] This procedure generally requires that both houses of a legislature formally request that the governor remove a judge.[25] After the required two-thirds vote of both houses produces the request, either the judge is automatically removed, or the governor is required to remove him from office.[26]

An evaluation of the address procedure results in many of the same criticisms leveled against the impeachment process. The lack of confidentiality and flexibility of sanction are as prevalent in the address process[27] as they are in the impeachment process. In both cases removal is the only option and proceedings are totally public. As a result, the problems of unwarranted damage to reputation and a lack of appropriate sanctions exist as well.[28]

As discussed below, the theoretically different procedures for evaluating charges in address and impeachment are in practice probably very similar. In both cases, by default, any preliminary evaluation that occurs is at the discretion of the legislator who is first apprised of the complaint. As a result, the utility of this initial evaluation is unknown.

The next step in the evaluation process, the request procedure, appears to be the equivalent of a bill of impeachment. There is, however, a difference because the request procedure originates in both houses, rather than in one. In both cases, legislative fact-finding, which would

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22. Over the course of our two hundred years as a nation, only 54 judges and one justice [on the federal bench] have been officially investigated. Of these only eight judges and one justice have been successfully impeached by the House, resulting in the conviction and removal of a mere four judges in two centuries.

Nunn, *supra* note 1, at 28.

23. In some jurisdictions, including California, a procedure having the same provisions as address is referred to as "concurrent resolution." *Judicial Discipline in California*, *supra* note 14, at 193 n.3.

24. The address procedure, in some form, can be found in twenty-eight states. JUDICIAL DISCIPLINE AND REMOVAL, *supra* note 6, at 3.

25. *Id.*

26. *Id.*

27. *Id.*

28. *See* notes 10-12, 17 *supra* and accompanying text.

precede the passage of any bill, probably occurs but in neither case is it formally required or regulated. While impeachment involves the additional requirement of a trial in the upper house, this is perhaps functionally offset by the fact that, in address, both houses must vote for removal.

Regardless of whether the disciplinary process requires a vote by one house and trial by the other or a vote by both houses, the decision still seems to be essentially political.[29] As a result, in the final analysis, the decision may be based on issues other than guilt or innocence of the judge.[30] Further compounding the problem in both address and impeachment is the fact that there are grave concerns about the qualifications of legislators to make such a determination.[31] The result then, because of their operative similarities, is that procedures for the evaluation of charges in address and impeachment are equally deficient.

Finally, in terms of overall efficiency, address has been characterized as unduly time consuming.[32] While the functions of the two legislative houses are different in impeachment and address, considering the importance of the issue (guilt or innocence) the time expended in either process must be substantial.

In conclusion, though procedurally distinguishable from impeachment, address seems susceptible to the same criticisms. Probably as a result, it is used as rarely as impeachment.[33]

C. Recall

Recall is available in only a few of the states.[34] The process is initiated by the electorate rather than the legislature. If a specified percentage of the electorate sign a petition for recall, a judge must face a special election.[35] If the judge fails to receive the required proportion of votes in that election, he is removed from office.[36]

As is the case with both impeachment and address, recall does not provide for confidentiality since the entire process is initiated and carried out by the public. Further, there is no flexibility of sanction since

29. *See, e.g., Judicial Discipline, supra* note 1, at 566.
30. *See* note 15 *supra* and accompanying text.
31. *See* note 16 *supra* and accompanying text.
32. *See, e.g., Judicial Discipline in California, supra* note 14, at 200; *North Carolina Commission System, supra* note 19, at 1075.
33. *See Judicial Discipline, supra* note 1, at 565-66.
34. Recall can be found in seven states. JUDICIAL DISCIPLINE AND REMOVAL, *supra* note 6, at 3.
35. *Id.*
36. *Id.*

removal is the only sanction provided for by law.[37] As a result, recall is subject to the same initial criticism as impeachment and address; there are no controls on unwarranted damage to reputation or inappropriate sanction.[38]

Conversely, one must note the striking differences between impeachment and address on the one hand and recall on the other with respect to procedures for the evaluation of charges. Recall provides *no* procedures for the evaluation of charges,[39] while impeachment and address both provide informal initial evaluation procedures and formal quasi-judicial (impeachment) or legislative (address) final evaluation procedures. Additionally, since there is no formal body responsible for the evaluation of charges, each member of the electorate must assume the responsibility of determining a judge's guilt or innocence.[40] If the procedures employed in impeachment and address are found lacking, it follows that the haphazard procedures in the recall process must be considered even more inadequate.

Finally, with regard to overall efficiency, recall, like impeachment and address, has been said to be both time consuming and expensive.[41] However, in recall the consumption of both economic and human resources affects entities other than those affected by impeachment and address. In the latter procedures, the legislature, *i.e.*, the taxpayers in general, bears the brunt of the resource expenditure. In the case of recall, those most involved in the recall campaign must bear the major burden for they are the ones most likely to contribute time or money. As a result, not only are the costs high,[42] but they are allocated among only a relative few, while potentially all stand to gain or lose by the expenditure.

In conclusion, recall, like impeachment and address, is sorely lacking with regard to all four evaluation categories. As a result, it is beset with similar problems.

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37. *Id.*

38. *See* notes 10-12, 17 *supra* and accompanying text.

39. *E.g.*, Frankel, *Judicial Conduct and Removal of Judges for Cause in California*, 36 S. CAL. L. REV. 72, 75-76 (1962).

40. Since legislators probably do not have sufficient time or expertise to evaluate charges against judges, *see* note 16, *supra*, it would be difficult to argue that the electorate in general is any more qualified. *See, e.g.*, *Judicial Discipline in California*, *supra* note 14, at 198 n.23.

41. *See, e.g.*, *Judicial Discipline*, *supra* note 1, at 566; *Judicial Discipline in California*, *supra* note 14, at 198.

42. *See, e.g.*, *Judicial Discipline in California*, *supra* note 14, at 198.

III. MODERN PROCEDURES

A. Courts on the Judiciary

Originally employed in New York, the court on the judiciary plan has found acceptance in several other states.[43] There are two basic versions of this system now in use.[44] In one instance, the court on the judiciary is a specially constituted court comprised of selected judges from the appellate and trial court levels. In other instances, charges are heard before an existing court, *e.g.*, the state supreme court. Generally, the court is convened when a complaint is filed. Usually complaints can be filed only by specified individuals. After a bench trial, either the complaint is dismissed, or the judge is removed or involuntarily retired.

With regard to the first evaluation issue, confidentiality, the court on the judiciary plan provides none[45] and therefore represents no improvement over the traditional procedures. As previously discussed, one of the more apparent consequences of this lack of confidentiality is the possibility of discrediting or embarassing judges even though complaints may ultimately prove groundless.[46] In addition, this lack of confidentiality provides no inducement for guilty judges to resign or retire, thereby shortening the process.[47] Thus, the lack of confidentiality opens the court process to the same criticisms leveled at traditional procedures.

With regard to the evaluation of charges, the court on the judiciary plan is a vast improvement over traditional procedures, at least in terms of the ultimate evaluation process. The final determination of guilt or innocence is made through a formal judicial process.[48] As a result, the probability of ascertaining the truth should be greater than in the less rigorous, quasi-judicial (impeachment), legislative (address), or electoral (recall) processes.

However, there is still a weakness in the evaluation process. The weakness is that no preliminary evaluation of charges takes place.[49] All charges from qualified sources, when a qualification requirement

43. The court on the judiciary plan has been adopted in some form in five states, and Puerto Rico. Cole, *supra* note 16, at 219.

44. The following description of courts on the judiciary is drawn from JUDICIAL DISCIPLINE AND REMOVAL, *supra* note 6, at 4.

45. WHO JUDGES THE JUDGES, *supra* note 11, at 66; *Judicial Discipline*, *supra* note 1, at 568.

46. *Judicial Discipline*, *supra* note 1, at 568.

47. WHO JUDGES THE JUDGES, *supra* note 11, at 67.

48. *See* JUDICIAL DISCIPLINE AND REMOVAL, *supra* note 6, at 4; WHO JUDGES THE JUDGES, *supra* note 11, at 57.

49. *See, e.g.*, *Judicial Discipline*, *supra* note 1, at 568.

exists,[50] must go to a bench trial in order to be resolved.[51] When this fact is combined with the lack of confidentiality, the risk of harming the reputation of innocent judges is significantly increased.[52]

The issue of flexibility of sanction does not favor the court on the judiciary plan. In cases not warranting removal, the court has no disciplinary capacity.[53] As a result, since there is insufficient flexibility to tailor the sanction to the infraction, relatively minor infractions must be punished either too severely or not at all.[54]

Finally, in terms of overall efficiency of procedure, the court system must receive high marks. Although the court may be required to convene in order to hear charges that could have been proven meritless by simple investigation, the court process must be considered a relatively economical use of time and money. This is especially true when compared with more traditional methods, which require the time and cost associated with full legislative or electoral processes. In the legislative process, the costs associated with the number of people involved in making use of both legislative houses clearly outweigh those that are necessary for a bench trial. Similarly, the costs involved in holding a recall election must, by sheer weight of numbers, exceed the costs attendant to a bench trial.

In conclusion, the court system provides no improvement over the traditional approaches in terms of confidentiality and flexibility of sanction. It does, however, improve upon the procedures for the final evaluation of charges, although no improvement is made with regard to initial evaluation. Finally, the court system has the potential for greater efficiency than any of the previously discussed alternatives.

B. Judicial Qualifications Commissions

California was the first state to adopt a judicial qualifications commission (Commission).[55] Many other states are now following suit.[56] Commissions are normally composed of judges, lawyers, and lay per-

50. In New York, for example, the Chief Judge of the Court of Appeals, the Governor, any one of the four presiding justices of the appellate division, or a majority of the executive committee of the state bar association may initiate procedures to convene the court. WHO JUDGES THE JUDGES, *supra* note 11, at 57.

51. In New York, however, the legislature may preempt the court's jurisdiction and make the final and conclusive determination itself. *Id.*

52. *See, e.g., id.* at 67.

53. *Id.*

54. *See* text accompanying and following note 17 *supra.*

55. Cole, *supra* note 16, at 220.

56. Judicial qualification commissions can be found in thirty-three states and the District of Columbia. *Id.* at 219.

sons.[57] Complaints usually may be filed by any individual. The Commission is flexible in its evaluation of complaints and may reject unfounded ones or merely caution a judge if the complaint is not very serious. If the Commission believes that a complaint is of a serious nature (and supported by fact) it may order formal hearings before the Commission or a panel of masters or referees. At the hearing, the accused judge is presented with the charges and given an opportunity to defend against those charges. After the hearing, the Commission may dismiss the charges, or recommend retirement, removal, or other disciplinary action. In the case of the latter three alternatives, the jurisdiction's highest court must make the final disposition. Generally, all proceedings prior to the final disposition are confidential and all testimony is privileged against defamation claims.

Since a version of the Commission system forms the basis of the Judicial Tenure Act, a full evaluation of that version will be made in the next section. However, some preliminary comments as to the system in general are appropriate here. First, with regard to the issue of confidentiality, the Commission system provides for confidentiality during all but the final steps in the process.[58] This policy should provide a remedy for some of the problems facing the previously discussed alternatives. The likelihood that reputations will be injured by unfounded charges should be greatly decreased, since charges that are invalid are more likely to be eliminated before confidentiality is breached. In addition, there is a greater incentive for guilty judges to retire. Since no damage to reputation is likely to occur in the preliminary stages of evaluation, retirement can be a graceful way out.

Second, in terms of the evaluation of charges, the Commission system provides both informal and formal mechanisms for preliminary evaluation. Such evaluations are conducted by both professionals in the legal field (judges and lawyers) and lay people.[59] The first level of evaluation is an informal initial evaluation conducted by the Commission staff. Charges that are patently frivolous are dismissed immediately.[60] Those claims that appear to be of a serious nature, and are supported by fact, are subject to a formal hearing.[61] Furthermore, an additional level of decision-making occurs. A supreme court must review the Commission's recommendations that stem from the formal

57. The following description of judicial qualification commissions is drawn from JUDICIAL DISCIPLINE AND REMOVAL, *supra* note 6, at 4.

58. *Id.*

59. *Id.*

60. *Federal Judges*, *supra* note 19, at 324.

61. *Id.*

hearing. Thus, the Commission system provides for an informal and a formal, three-staged evaluation of charges.

Third, the Commission system provides for flexibility of sanction by allowing for removal, retirement or other disciplinary action. The result should be that sanctions are more appropriately meted out to fit the infraction. Also, individuals may be more willing to lodge complaints when it is clear that sanctions can fall short of removal from office.

Finally, the Commission system is more efficient on a case-by-case basis than the traditional approaches because the participation of the full legislature or electorate is not required. However, it is necessarily more expensive than the court system, which, because it is convened only when complaints are filed, does not have the Commission's permanent staff costs.

Whether or not these costs are justifiable depends on the volume of complaints that need to be screened. As the volume of complaints increases, the function served by the staff should become more cost effective, for they can eliminate groundless charges without invoking the full court procedure.

In conclusion, it appears that the Commission system remedies many of the problems that plague the other approaches discussed earlier. However, because it requires a permanent staff, it may also be more expensive in the long run.

IV. JUDICIAL TENURE ACT PROCEDURE

A. The Procedure as Outlined in the Judicial Tenure Act

The procedure outlined by the Judicial Tenure Act is intended to "establish within the judicial branch of government a system for investigating and resolving allegations that the condition or conduct of members of the Federal judiciary is or has been inconsistent with the good behavior required under Article III, section 1 of the Constitution of the United States."[62]

The disciplinary system proposed by this legislation[63] has three components. First, there is a committee for each of the circuits and each of the special national courts (Court of Claims, Court of Customs and

62. S. REP. NO. 1035, *supra* note 3, at 1-2.

63. There is a slightly different procedure proposed for dealing with the condition or conduct of Supreme Court Justices. Two main differences exist. First, the committees are not involved. All investigation is conducted by the Commission. Second, at the end of formal hearings by the Court on Judicial Conduct and Disability, it only recommends to the House of Representatives that it either censure, impeach or dismiss the charges against the justice. These recommendations are not subject to judicial review. *Id.* at 2-3.

Patent Appeals, and Customs Court).[64] The chief judge of each circuit or court serves as the presiding officer of the committee that is comprised of appellate and, when appropriate, trial court judges from that circuit or court. Second, there is a Judicial Conduct and Disability Commission. The Commission is comprised of one member elected by each circuit and one member elected collectively by the special national courts. Third, there is a Court on Judicial Conduct and Disability. The court is comprised of seven members of the Judicial Conference of the United States. The presiding officer of the court is elected by the Judicial Conference, who in turn selects the other six members.

Complaints are filed with the Judicial Conduct and Disability Commission, which may either dismiss a complaint[65] or refer it to the appropriate circuit/court committee. The committee then investigates the complaint and recommends that the Commission dismiss the complaint, investigate the complaint further, or give the committee a reasonable period of time to address the matter alleged in the complaint.

If the Commission finds sufficient evidence that the condition or conduct of the judge may be inconsistent with the constitutional good behavior requirement, it recommends that the Court on Judicial Conduct and Disability hold a formal hearing. After a hearing, which must comply with certain due process requirements specified in the Act, the Court may order involuntary retirement, removal, censure, or dismissal of charges. Either the Commission or the judge may seek review in the Supreme Court by petitioning for a writ of certiorari. All proceedings prior to the time the Commission makes its recommendation are confidential.

B. Evaluation of the Procedure

At the end of the third section, judicial qualification commission systems, in general, were evaluated. In the following subsections, the differences in evaluation that result from the peculiarities of the system proposed in the Judicial Tenure Act will be discussed. Issues idiosyncratic to the Act will also be discussed.

1. Does the Procedure Provide Sufficient Confidentiality?

The confidentiality procedure proposed in the Act does not vary from the procedures generally used in Commission plans. Both pro-

64. The following description of the procedure proposed in the Judicial Tenure Act is drawn from S. REP. No. 1035, *supra* note 3, at 2-3.

65. Preventing premature injury to judges' reputations is one of the goals of this legislation. *Id.* at 32.

vide for confidentiality at all but the final stages of the process. It could be argued plausibly that the confidentiality provision should be dropped entirely. It could be argued just as plausibly that it should be extended through the end of the process. The former position could be supported by the argument that, since public confidence in the judiciary can be one of the by-products of an effective tenure system, it should be encouraged by making the process open and thus available for public scrutiny. If decisions on misconduct are made public at every stage, there would be little opportunity for claims that the judiciary was collusively protecting its own by sidestepping legitimate claims. Unfortunately, such a process could also have the effect of unjustifiably damaging the reputations of those jurists who are ultimately found innocent of all charges. It is often the case that the public will remember charges of misconduct, but either forget or not bother to determine the ultimate resolution.

The equally persuasive argument that the entire process should be confidential also has its pitfalls. Such an argument urges that, since the final resolution on guilt or innocence is not made until final Supreme Court review has been obtained, no information should be released prior to that point. This argument implicitly suggests that judges' reputations must remain unchallenged in order for judges to be effective. Since performing one's duties without criticism can give the appearance of being above reproach, such an assertion is not without merit. However, once the decision is made to investigate and evaluate judicial misconduct, denying public scrutiny makes it more difficult to maintain an appearance of proper, non-collusive evaluation.

Thus, two important needs are in conflict—the need to protect judicial reputations from unjust injury and the need to garner public confidence in the fairness of the evaluation process. The procedure proposed in the Judicial Tenure Act resolves this conflict through compromise. Confidentiality is initially maintained in order to protect against disclosure of obviously insubstantial claims. Openness is provided in later stages in order to permit public scrutiny. It is hoped that this balance will prevent premature injury to judges' reputations[66] while maintaining public confidence.

66. "The executive director of the commission screens all complaints after they are filed in order to dismiss, without prejudice, any that are improperly verified or subscribed. After preliminary inquiry, the executive director shall dismiss, with prejudice, any complaint which is frivolous or outside the jurisdiction of the commission." *Id.* at 21.

2. Does the Procedure Provide an Effective System for the Evaluation of Charges?

The procedure proposed in the Judicial Tenure Act is virtually the same as the general Commission plan, except for two modifications. The first of the two modifications, the addition of a committee of judges, was included because "the facts concerning the alleged conduct . . . are more likely to be available in the circuit or court of the judge against whom a complaint has been lodged rather than from investigative efforts monitored by a national commission."[67] Since the committee merely makes recommendations to the Judicial Conduct and Evaluation Commission rather than making the final decision, the opportunity for both the fact and appearance of impropriety is avoided even though the judge is being investigated by his closest peers (*i.e.*, same circuit or court).

The second modification is the use of the Court on Judicial Conduct and Disability. Any charges that the Commission (after input from the Commission staff and the appropriate committee)[68] finds to be supported by sufficient evidence are recommended for hearing before the court.[69] Thus, unlike the general commission plan, the Act provides for a hearing by an agency other than the Commission itself. As a result, the difficult situation that exists when the same agency both prosecutes and adjudicates a claim does not occur. Also, the perspective of yet another group of people is brought to bear on the problem of determining guilt or innocence.

Theoretically, the plan proposed in the Act, like the general Commission plan, provides an effective evaluation procedure. The fact that evaluation is multistaged lends credibility to the proposition that the system will ascertain the truth, due to the fact that several groups of people evaluate the charge. Furthermore, each of the stages in the process serves as a check upon the preceding one.

Unfortunately, the evaluation procedure outlined in the Act does not provide for the involvement of lay people, except in the filing of complaints.[70] This may be a weakness in the Act because the appearance of

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67. *Id.*

68. After the committee conducts its investigation, it recommends that the Commission either dismiss the complaint, initiate its own investigation, or allow the committee to address the matter raised in the complaint itself. *Id.* at 24.

69. *Id.* at 25.

70. While some of the State disciplinary review systems have included laymen or non-judicial members, this usually has required an amendment of the State constitution. Further, the Committee on the Judiciary believes that the judges themselves are in the best position to determine whether the condition or conduct of members of the judiciary

propriety may be as important as its existence. The inclusion of lay members on the Commission would support this appearance. The participation of lay people in the process would help alleviate any concerns that the profession was protecting its own rather than searching out and punishing misconduct. While it does not completely solve the problem of lack of lay participation, the fact that proceedings before the Court on Judicial Conduct and Disability are open to public scrutiny (*i.e.*, no confidentiality) may reduce some of the public's potential concerns. Although lay people are not involved in the decision-making process, the openness of that process tends to expose any collusion and thus greatly reduce the probability of both the fact and appearance of impropriety.

3. Does the Procedure Provide Sufficiently Flexible Sanctions?

One of the crucial problems with all of the other approaches to judicial tenure is the lack of flexibility of sanction. As previously stated, the procedure outlined under the Act provides for removal *or* censure of judges found to be in violation of the good behavior standard of the United States Constitution.[71] It also permits involuntary retirement of judges eligible to retire who are found to be permanently disabled (mentally or physically).[72]

This ability to vary the sanction is perhaps the most novel and valuable feature of the procedure proposed in the Judicial Tenure Act. It allows the Commission to chastise misconduct that falls short of that requiring removal. Absent such flexibility with respect to choice of sanction, minor infractions would either go entirely unpunished or be punished greatly out of proportion to the harm caused.

4. Does the Procedure Provide an Efficient Means for the Discipline and Removal of Federal Judges?

As mentioned earlier, traditional approaches require either the full attention of a legislature or a full recall or election process in order to determine whether misconduct has occurred. Courts on the judiciary, on the other hand, require only a court composed of a small number of judicial officials. The commission system proposed by the Judicial Tenure Act falls somewhere between the two in terms of the number of

is inconsistent with the good behavior requirement of article III, section 1, of the Constitution of the United States.

Id. at 19-20.

71. *Id.* at 32.

72. *Id.* at 45.

people and probable expense required in order to evaluate judicial conduct.

It is relatively clear that the traditional approaches are both inefficient and ineffective in evaluating charges. That apparently is not the case with the courts on the judiciary, for they are clearly efficient in both economic and human resources. They are also able to evaluate charges effectively. The difference between the Judicial Tenure Act's commission system and the court on the judiciary plan clearly lies in the use of preliminary investigation and screening procedures.

Assuming, arguendo, that both systems are in fact equally capable of evaluating charges, the efficiency of one over the other must be determined in light of the number of claims that need be addressed. The greater the number of claims, the more efficient it becomes to use a preliminary investigation and evaluation process. However, there are other alternatives. The courts on the judiciary often place limits upon the number of people who will be eligible to register claims. Such limits can serve the same purpose as the preliminary investigation and evaluation; they control the number of cases that must be tried.

Although limiting the number of people who may file claims may be an efficient use of resources, there are inherent problems in such a system. First, those who are allowed to file charges are necessarily doing their own preliminary evaluation. Without the resources and safeguards of a formal procedure and/or agency, such evaluations can be more problematic than advantageous. Second, denying most citizens the opportunity to file claims may appear to be an attempt to hide, or at least not punish, misconduct. Given a sufficient number of charges to warrant *any* screening process, the specific approach posed in the Judicial Tenure Act seems a viable solution. If, on the other hand, there are relatively few complaints to process, the costs inherent in maintaining a permanent commission for the purpose of preliminarily screening complaints seems an unnecessary expense.

5. Does the Procedure Violate the Constitution in that Impeachment Is the Only Permissible Way to Remove Federal Judges/Justices?

Even if the procedure proposed in the Judicial Tenure Act is acceptable in terms of confidentiality, evaluation of charges, flexibility of sanction, and overall efficiency, it still may be subject to other valid attacks. Not least among these criticisms is that it is unconstitutional.[73]

73. Other criticisms are discussed in subsequent sections.

A relatively recent case dealing with the permissibility of alternatives to impeachment is *Chandler v. Judicial Council*.[74] In *Chandler*, Justices Douglas and Black suggested in their dissenting opinions[75] that the only permissible procedure for the removal of federal judges or justices is impeachment. This position finds historical support in the Federalist Papers. In Federalist No. 79, Alexander Hamilton stated that "[t]he precautions for their [federal judges'] responsibility are comprised in the article respecting impeachments."[76]

Furthermore, it has been suggested that, according to the maxim of constitutional construction "expressio unius est exclusio alterius,"[77] impeachment is the only permissible way to remove federal judges.[78] This line of reasoning relies upon the argument that since impeachment is the only removal procedure mentioned in the Constitution, it is the only one that may be validly utilized.

As might be expected, there are also arguments on the other side of the issue. It has been suggested that the mere fact that Congress has the sole power of impeachment does not necessarily indicate that Congress also has the sole power of removal.[79] Carrying this further, it has been suggested that since Congress does not have the sole power of removal, and since there are no provisions preventing the judiciary from "cleaning its own house," the non-impeachment procedure in the Judicial Tenure Act is constitutionally permissible.[80]

Another line of reasoning also supports the constitutionality of the Judicial Tenure Act. It has been argued that the good behavior standard of article III, section 1 is as applicable to federal judges as is the high crimes and misdemeanors standard of article II, section 4. If only impeachment (under article II, section 4) is permitted, then the standard of article III, section 1 is redundant and would therefore have no effect. Such an outcome is contrary to long standing rules of constitutional interpretation, which require that each constitutional provision

74. 398 U.S. 74 (1970).

75. *Id.* at 136 (Douglas, J., dissenting); *id.* at 142 (Black, J., dissenting).

76. THE FEDERALIST PAPERS 474 (2d printing, New American Library of World Literature, 1964).

77. This is defined in Black's Law Dictionary as follows: "[e]xpression of one thing is the exclusion of another." (citations omitted). BLACK'S LAW DICTIONARY 692 (rev. 4th ed. 1968). Black's further states that "[u]nder this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded" (citations omitted). *Id.*

78. Andrews, *supra* note 14, at 158; 124 CONG. REC. S14,753 (daily ed. Sept. 7, 1978) (remarks of Sen. Bayh).

79. *E.g.*, Andrews, *supra* note 14, at 159; Nunn, *supra* note 1, at 31.

80. Nunn, *supra* note 1, at 30.

be given meaning.[81]

Clearly, there are two strong, yet diametrically opposed arguments on the constitutionality of the Judicial Tenure Act. If passed, the resolution of the conflict will be, appropriately, the province of the Supreme Court.

6. Does the Good Behavior Standard Provide Sufficient Guidance to the Commission?

The Judicial Tenure Act states that conduct inconsistent with the good behavior requirement of the Constitution includes "but is not limited to willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, or other conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[82] This definition has been subject to two major criticisms. First, it has been suggested that this definition is comprised of "broad, vague terms at best."[83] Second, it has been argued that because of the definition utilized it would be possible "to remove a judge guilty of obscene conversations with relative ease, but being able to get rid of a judge who has committed murder or treason or accepted bribes [could] only [be accomplished] through impeachment."[84]

With regard to the first contention, it appears that the terms in the definition are in fact not unreasonably vague. The committee report on this bill[85] included examples of actionable misconduct under each of the terms in the definition.[86] Also, states that have employed these terms in conjunction with their own removal procedures have found them clear enough to guide disciplinary action.[87] If several states can take action without successful constitutional challenge the terms are arguably sufficiently clear. Furthermore, since examples of behavior falling within each definitional term were part of the senate committee's report, the legislative intent is relatively clear.

Finally, as to the second criticism, it may not be the case that the

81. *Id.* at 31.

82. S. REP. NO. 1035, *supra* note 3, at 32.

83. 124 CONG. REC. S14,765 (daily ed. Sept. 7, 1978) (remarks of Sen. Bayh).

84. *Id.*

85. S. REP. NO. 1035, *supra* note 3.

86. *Id.* at 34-36.

87. In construing these terms, state courts have sometimes had to look to other standards of judicial conduct. For example, in construing the term "willful misconduct," the North Carolina Supreme Court looked to "the traditions, heritage, and generally recognized practices of the courts and the legal profession, the common and statutory law, codes of judicial conduct, and traditional notions of judicial ethics." *In re* Edens, 290 N.C. 299, 306, 226 S.E.2d 5, 9 (1976).

good behavior standard and the high crimes and misdemeanors standard will be enforced by different procedures (commission or impeachment) that potentially would make one more easily enforceable than the other. Since it has been suggested that impeachment trials have utilized both standards, it can be argued that the two criteria have merged.[88] As a result of the fact that the committee report on the Judicial Tenure Act merely gives examples of misbehavior rather than an all inclusive list,[89] one might argue that the merger works in both directions, resulting in both criteria being enforced by the commission system as well as by the impeachment process. If such is the case, and if either procedure may be used for either category of offense, removal would not be easier for one offense than for another.

7. Is the Procedure an Unwarranted Intrusion upon Judicial Independence?

The Judicial Tenure Act has been attacked as an "ominous threat" to American society.[90] Such a characterization is based on the belief that, "[t]o allow any simpler process [than impeachment] for judicial removal, even one under the control of judges themselves, who [*sic*, would] eviscerate the independence of the individuals on the bench."[91] Further, it has been suggested that judges might not feel secure in taking positions contrary to what their fellow judges approve, for fear of invoking the Act.[92]

In opposition to these suggestions, it has been urged that the issue of judicial independence relates only to independence from the other two branches of government.[93] Since the Act only provides procedures for intra-judicial scrutiny, rather than extra-judicial scrutiny, it has been argued that it cannot be considered an invasion upon the right of judicial independence.[94]

In light of the extreme rarity of impeachment, it is apparent that additional procedures for the discipline and removal of judges are required. The fact that the proposed procedure is both under judicial control and ultimately open to public scrutiny would clearly seem to allow less potential for abuse than would be the case under more tradi-

88. *Removing Federal Judges*, *supra* note 2, at 418.
89. S. REP. NO. 1035, *supra* note 3, at 34-36.
90. Report of speech by United States Court of Appeals Judge Irving R. Kaufman. L.A. Daily J., November 7, 1978, at 1, col. 3.
91. *Id.*
92. 124 CONG. REC. S14,755, S14,762 (daily ed. Sept. 7, 1978) (remarks of Sen. Bayh).
93. Nunn, *supra* note 1, at 31.
94. *Id.*

tional disciplinary alternatives. Although merely reducing the potential for abuse does not completely remove the "ominous threat," it does bring it within tolerable limits. The alternative to accepting even a minor potential for abuse is to maintain the status quo. The status quo is an unacceptably low incidence of the utilization of disciplinary procedures.

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